

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACEY PAGE, JR.,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 250433

Wayne Circuit Court

LC No. 01-011507-01

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of reckless use of a firearm, MCL 752.863a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 2 to 10 years in prison for the assault, 90 days for the reckless use of a firearm, and 2 years in prison for the felony-firearm conviction. We affirm.

This case arose out of a dispute between defendant's sister, Keisha, and her estranged husband, Eric Allen. Eric went to Keisha's home, pushed her down, kicked her in the head, scratched her, and choked her. He took their infant daughter, Tyler, over to his parents' house. Keisha called her husband's mother, Arline, and told her what happened. Keisha also called the police, but according to Keisha's testimony, they would not retrieve Tyler for her. Keisha then called her father to go get the child, but reached defendant instead. Defendant drove over to Eric's parents' house, and while Arline held Tyler outside by the house's side door, Eric approached defendant's truck. Defendant pulled a gun from his vehicle and opened fire on Eric, hitting him in the arm. Defendant fled the scene, and police arrested him several days later. Defendant was charged with three counts of assault with intent to murder for shooting at Eric while Arline and Tyler were present. The jury found defendant guilty, but only on the lesser offenses listed above.

On appeal, defendant first contends that the trial court erred in denying defendant's motions for mistrial and new trial on the grounds of prosecutorial misconduct. Specifically, defendant argues that the prosecutor called Eric Allen knowing that he would invoke his Fifth Amendment privilege in front of the jury. Defendant argues that this tactic denied defendant a fair trial and infringed on his right to confront the witnesses against him. We disagree. We review a trial court's decision to deny a motion for mistrial or new trial for an abuse of

discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

While it is usually prejudicial to call a witness who is intimately related to the criminal episode when the judge and the prosecutor know that he will assert the Fifth Amendment privilege not to testify, *People v Poma*, 96 Mich App 726, 733; 294 NW2d 221 (1980), in this case, Eric's assertion of the privilege likely assisted rather than prejudiced defendant. Defendant's theory of the case was self defense. Defendant and a passenger in his truck both testified that Eric drew a gun first and pulled the trigger before defendant drew his gun and shot Eric. A neighbor corroborated this account. By asserting the Fifth Amendment, Eric also lent credence to the proposition that he pointed a gun at defendant, actually assisting the defense. See *People v Dyer*, 425 Mich 572, 574-576; 390 NW2d 645 (1986). Therefore, Eric was not one of the "certain witnesses" whose invocation of Fifth Amendment protections will result in "intrinsic prejudice" to the accused. *Poma, supra* at 731. The trial court also offered a curative instruction that the jury should not draw any adverse inference from Eric's assertion of the Fifth Amendment privilege. Therefore, defendant fails to establish any serious potential for prejudice in this case.

Furthermore, the prosecutor and a bailiff who witnessed the prosecutor's interview with Eric confirmed that Eric never mentioned "taking the Fifth," so the trial court did not err when it found that the prosecutor lacked advance notice of Eric's intention to assert the privilege. Under these circumstances, the trial court did not abuse its discretion when it denied defendant's motion for mistrial and a new trial. We also reject defendant's related claim that his right of confrontation was violated, because Eric did not provide any substantive evidence before he asserted the privilege. *People v Gearns*, 457 Mich 170, 186-187; 577 NW2d 422 (1998), overruled on other grounds; *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999).

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. We review de novo a claim of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Defendant first argues that the prosecutor improperly used defendant's silence against him when she insinuated in closing arguments that if defendant had a valid self-defense claim he would have brought it up sooner. While a prosecutor may not use the silence of an accused individual against him, this proscription applies only in cases where the defendant does not take the stand or when the prosecutor uses a defendant's silence after he received *Miranda*¹ warnings. *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). In this case, the prosecutor's argument related to defendant's failure to take the initiative and assert his defense to either the police or to family members, and also challenged defendant's spontaneous testimonial assertion that he did not have an earlier opportunity to present his self-defense claim to police. Because the prosecutor's argument properly drew inferences from the evidence and merely responded to defendant's insinuations, defendant was not denied a fair trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Crump*, 216 Mich App 210, 214-215; 549 NW2d 36 (1996).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Next, defendant argues that the trial court erred in denying defendant's request for instruction on the lesser offense of careless, reckless or negligent discharge of a firearm causing injury, MCL 752.861. We disagree. Instructional errors are reviewed de novo. The offense of reckless discharge of a firearm is not a necessarily included lesser offense of assault with intent to murder, *People v Lowery*, 258 Mich App 167, 173-174; 673 NW2d 197 (2003), and the facts established at trial did not support the conclusion that defendant discharged the weapon recklessly rather than intentionally. Therefore, an instruction on reckless discharge of a firearm was not warranted. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002).

Finally, defendant argues that the trial court improperly instructed the jury on defendant's flight because there was no evidence that defendant knew police were looking for him. We disagree. The term "flight" includes fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Trial testimony supports the trial court's flight instruction, because defendant fled the scene after shooting Eric, did not return home, and otherwise eluded police for several days. We find that this evidence was sufficient to infer that defendant fled in fear of apprehension. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Therefore, the trial court properly instructed the jury regarding defendant's flight.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell